In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN,
Petitioner,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, was filed on March 29, 1976, and was certified for nonpublication pursuant to *California Rules of Court,* Rule 976. It has therefore neither been officially reported, nor published. The opinion is set forth in full as Appendix A to the Opposition of Respondent to Petition for Writ of Certiorari filed herein on November 5, 1976. That opinion was rendered after this Court vacated an earlier judgment of the California Court of Appeal filed

on January 11, 1973. See *Splawn v. California,* 414 U.S. 1120 (1974). Pursuant to *California Rules of Court,* Rule 976, this earlier opinion was neither officially reported nor published, but is fully set forth as Appendix B of the Opposition of Respondent to Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code, section 1257(3).

STATEMENT OF THE CASE

Proceedings in the State Courts.

On April 3, 1970, an Information was filed in the Superior Court of the State of California for the County of San Mateo, by which petitioner (together with co-defendants Don Splawn and Robert Esselstein) was accused of the following: *COUNT I*—Conspiracy to commit a crime, to wit: violation of California Penal Code section 311.2, in violation of California Penal Code section 182, a felony; and *COUNT II*—distribution of obscene matter in violation of California Penal Code section 311.2, a misdemeanor (Appendix, pp. 22-24). Jury trial commenced on June 7, 1971, and concluded on June 21, 1971, when the jury returned verdicts by which petitioner was found guilty of a violation of California Penal Code section 311.2 (Appendix, p. 15). Timely notice

of appeal to the California Court of Appeal was filed, and petitioner was admitted to bail pending that appeal.

On direct appeal petitioner raised nine issues, including an attack on the trial court's instructions concerning "pandering". That issue was resolved adversely to petitioner by the California Court of Appeal (See Opposition of Respondent to Petition for Writ of Certiorari, Appendix B, at pp. xviii-xx). Thereafter, petitioner sought a hearing before the California Supreme Court which was denied, without opinion, on March 8, 1973.

Proceedings in Splawn v. California, No. 73-200.

On January 7, 1974, this Court granted certiorari, vacated the judgment of the California Court of Appeal, and remanded the case "for further consideration in light of *Miller v. California,* 413 U.S. 15 (1973); *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973); *Kaplan v. California,* 413 U.S. 115 (1973); *United States v. 12 200-ft. Reels of Film,* 413 U.S. 123 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973); and *Alexander v. Virginia,* 413 U.S. 830 (1973)."

Proceedings in the State Courts on Remand.

Upon receipt of this Court's order vacating its earlier judgment, the California Court of Appeal requested additional briefing on the constitutionality of the definition of "obscenity" as set forth in California Penal Code section 311(a). The California Court of Appeal reaffirmed petitioner's conviction on March 29, 1976, in an opinion which substantially republished,

without material difference, those portions of its earlier opinion rejecting petitioner's claim that the "pandering" instructions were improper. Petitioner's application to the California Supreme Court for a hearing was denied on May 26, 1976.

STATEMENT OF THE FACTS

Armand Drivon, a part-time employee of the Redwood City Police Department had known petitioner since 1966 when petitioner first offered "hardcore" pornography to Mr. Drivon (RT 44). In 1969, Mr. Drivon began negotiating with appellant's brother Don Splawn for the purchase of some "hardcore" films at petitioner's place of business, the Golden Gate Book Store located in Redwood City. Don Splawn advised Drivon that he had two "under-the-counter" films available for sale at a price of $50.00 apiece, but stated that these films were not carried in stock at petitioner's bookstore (RT 28). Several unsuccessful appointments were arranged for Drivon to pick up the films (RT 29-34). During the course of negotiations, Don Splawn assured Drivon that he would be completely satisfied with the films. Describing the "hardcore" films he told Drivon that they would be sucking toes, licking navels and everything else (RT 30). He also mentioned that the films were being supplied by petitioner (RT 33).

On November 4, 1969, Drivon met with petitioner at petitioner's bookstore to further discuss the purchase of these films (RT 35-36). Petitioner made a tele-

phone call in an attempt to locate some films then left the store returning a few minutes later. Petitioner told Drivon that he could obtain the films in two days, but if Drivon was in a great hurry petitioner offered to go to San Francisco to pick them up (RT 37). They settled on the price of the films, which petitioner stated were normally selling for much more in San Francisco. Petitioner also explained to Drivon that he had to be very careful in handling these films since they were "hardcore" material concerning which he had previously had trouble with the police (RT 46). Petitioner assured Drivon that he would be getting strictly "hardcore" material (RT 47).

When Drivon returned to petitioner's bookstore on November 7, 1969, the clerk gave him a package containing two reels of film in exchange for $70.00 (RT 47). Drivon thereafter contacted petitioner by telephone, and from their conversation it was apparent that petitioner had previously viewed these films (RT 72). Indeed, appellant admitted viewing the films prior to their sale (RT 633).

The films themselves were admitted into evidence (RT 97), were viewed by the California Court of Appeal and will be placed in the custody of the clerk of this court before the argument pursuant to Rule 38.

SUMMARY OF ARGUMENT

The sale of the two films forming the basis of petitioner's conviction occurred on November 7, 1969. Three days later a new section of California's Obscen-

ity Law, Penal Code section 311(a)(2) became effective. That section recognized the probative value evidence of circumstances of production and dissemination may have in determining whether the social value claimed for the material in question was the basis upon which it was traded in the marketplace or a spurious claim adopted only for the purposes of litigation. Petitioner contends he has been subjected to an *ex post facto* application of this section and, that the jury instructions based on this section were unsupported by the evidence resulting in his being convicted of "pandering".

Respondent contends that the circumstances of production and dissemination are relevant to the definitional requirements for a finding of obscenity [*Ginzberg v. United States,* 383 U.S. 463, 470-471 (1966)] rather than an element of the culpable conduct, selling obscene matter. The receipt of this evidence and the giving of the challenged instructions did not therefore result in petitioners being convicted of "pandering". *Hamling v. United States,* 418 U.S. 87, 130 (1974). Nor, has petitioner been subjected to an *ex post facto* application of this section, which merely codified the previously recognized relevance evidence of circumstances of production and dissemination have on the issue of social importance. *Luria v. United States,* 231 U.S. 9, 27 (1913); *Thompson v. Mississippi,* 171 U.S. 380, 386-388 (1898); *Hopt v. Utah,* 110 U.S. 574, 587-590 (1884); *Ward v. California,* 269 F.2d 906, 907 (9th Cir. 1959).

ARGUMENT

THE JURY WAS PROPERLY INSTRUCTED THEY COULD CONSIDER EVIDENCE OF THE CIRCUMSTANCES OF PRODUCTION AND DISSEMINATION AS RELEVANT TO DETERMINING WHETHER SOCIAL IMPORTANCE CLAIMED FOR THE MATERIAL WAS IN THE CIRCUMSTANCE PRETENSE OR REALITY.

Petitioner was convicted of distributing obscene material, a violation of California Penal Code section 311.2. This is the second time his conviction has been before this Court. In 1973 petitioner attacked the validity of his conviction alleging that California's statutory definition of obscenity, California Penal Code section 311, was unconstitutional. This Court vacated the judgment and remanded the case for reconsideration of the statute in light of *Miller v. California,* 413 U.S. 15 (1973). *Splawn v. California,* 414 U.S. 1120 (1974). Petitioner's conviction was reaffirmed (See Appendix A of Petition for Writ of Certiorari). California's statutory definition of obscenity, as authoritatively construed by our courts, is constitutional [*Hicks v. Miranda,* 419 U.S. 1018 (1975); *Bloom v. Municipal Court,* 16 Cal.3d 71, 127 Cal.Rptr. 317 (1976)] a point petitioner no longer contests. Neither, does he assert that the material he sold is not obscene. Instead, petitioner now contends that because the jury was instructed that they could consider whether his sole emphasis in selling these films was on their sexually provocative aspects to determine whether they were utterly without redeeming social importance (Appendix, p. 39), that he has been unconstitutionally subjected to an *ex post facto*

application of California Penal Code section 311(a)(2).[1] Alternatively, petitioner asserts these jury instructions, based on California Penal Code section 311(a)(2), are unconstitutionally overbroad, in that they subjected him to prosecution for the acts of another not on trial, namely the creator of the material (Appendix, p. 40), and that these instructions were unwarranted because there was no evidence of commercial exploitation sufficient to support them.

Respondent contends that California Penal Code section 311(a)(2) recognizes, as a procedural rule of evidence, the probative value that circumstances of production and dissemination have on the issue of the social importance, or lack thereof, of the material in question. We therefore respectfully submit petitioner's conviction has not been obtained through the use of unconstitutionally overbroad instructions, or the *ex post facto* application of this statute.

A. Circumstances of Production and Dissemination are Relevant to Determining whether the Questioned Material has Social Importance.

Petitioner argues that it was impermissible to allow the jury to consider evidence of the circumstances of production and dissemination in determining whether the two films in question were obscene. He contends such evidence is constitutionally admissible only when

[1]There is no dispute between the parties that California Penal Code section 311(a)(2), though passed by the Legislature and signed by the Governor prior to the date petitioner sold the films in question, November 7, 1969 (Appendix, p. 24), did not become effective until three days later; five months later the Information accusing petitioner of selling obscene matter was filed (Appendix, p. 22). Cf. Brief for Petitioner, p. 14, fn. 3.

the creator or producer of the material is on trial. This argument is based on an erroneous premise, resulting from petitioner's use of the verb "pandering" to characterize his offense, that the circumstances of production and dissemination are elements[2] of the substantive offense of which he has been convicted. Respondent contends circumstances of production and dissemination are relevant to the definitional requirement of obscenity that it lack serious literary, artistic, political, or scientific value. *Miller v. California,* 413 U.S. 15, 24 (1973).

The offense of which petitioner stands convicted (Appendix, p. 26) has two elements: (1) the knowing sale of; (2) obscene matter. "Obscene matter" is defined by California Penal Code section 311(a) as matter, taken as a whole: (a) the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest; (b) which goes substantially beyond customary limits of candor in description or representation of such matters; and (c) which is utterly without redeeming social importance. California Penal Code section 311(a)(2) recognizes that:

> "In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate the

[2]Petitioner's premise might have merit had he been convicted of violating California Penal Code section 311.5, which was amended at the same time as section 311(a)(2) was adopted and provides:

> "Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented to be obscene, is guilty of a misdemeanor."

matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

After the jury in petitioner's case was fully instructed on the three factors essential to a finding that the questioned material is obscene, they were further instructed:

> "Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyors sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance.
>
> If the object of [the] work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence that the work is obscene." (Appendix, p. 39-40).

Finding an opinion of Judge Learned Hand [*United States v. Rebhuhn,* 109 F.2d 512 (2nd Cir. 1940)] persuasive authority, this Court concluded in *Ginzberg v. United States,* 383 U.S. 463 at 470-471 (1966), that evidence of the circumstances of presentation and dissemination of questioned material are relevant to determine whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim adopted only for the purpose of litigation. This Court concluded that where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. The fact that the materials originate or are used as a subject of pandering is relevant to the application of the test of obscenity detailed in *Roth v. United States,* 354 U.S. 476 (1956) which is the basis of California Penal Code section 311. The fundamental notion that evidence of production and dissemination may serve to tip the balance toward a finding of obscenity first appeared in the separate opinions of Chief Justice Warren in *Roth v. United States,* 354 U.S. at 495 (concurring opinion) and *Jacobellis v. Ohio,* 378 U.S. 184, 201 (1964) (dissent). It took firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering this Court's judgment in *Memoirs v. Massachusetts,* 383 U.S. 413, 420 (1965), before reaching full bloom in the majority opinion in *Ginzberg, supra.* The probative value of such evidence has been widely recognized by federal courts. *Cf. United States v. Palladino,* 475 F.2d 65, 70-71 (1st Cir. 1973); *Milky Way Productions, Inc. v. Leary,* 305 F.Supp. 288, 294 (S.D.N.Y. 1969) (three judge court) affirmed, 397 U.S. 98 (1970). Finally, and significantly, this Court recently rejected a challenge to these instructions which was based on an objection, substantially the same as that raised by petitioner here.

"Finally, we similarly think petitioner's challenge to the pandering instruction given by the district court is without merit. The district court instructed the jurors that they must apply the three-part test of the plurality opinion in *Memoirs v. Massachusetts,* 383 U.S. at 418, and then indicated that the jury could, in applying that test, if it found the case to be close, also consider whether the materials had been pandered by looking to their '[m]anner of distribution, circumstances of production, sale, . . . advertising. . . . [and] editorial intent. . . .' App. 245. This instruction was given with respect to both the Illustrated Report and the brochure which advertised it, both of which were at issue in the trial.

> *"Petitioners contend that the instruction was improper on the facts adduced below and that it caused them to be 'convicted' of pandering. Pandering was not charged in the indictment of the petitioners, but it is not, of course, an element of the offense of mailing obscene matter under 18 U.S.C. section 1461. The district court's instruction was clearly consistent with our decision in Ginzberg v. United States, 383 U.S. 463 (1966), which held that evidence of pandering could be relevant in the determination of the obscenity of the materials at issue, as long as the proper constitutional definition of obscenity is applied."* *Hamling v. United States,* 418 U.S. 87, 130 (1974) (Emphasis added).

It must be recognized that here, as in *Hamling,* the jury was fully instructed that in order to convict they had to find, *beyond a reasonable doubt,* each of three factors which constitutionally define obscenity (Appendix, p. 35). The questioned instructions therefore

were clearly consistent with *Ginzberg,* and merely indicated the probative value evidence of production and dissemination may have in determining social value.

This Court decides obscenity cases "not merely to rule upon the alleged obscenity of a specific film or book but to establish principles for the guidance of lower courts and legislatures." *Jacobellis v. Ohio,* 378 U.S. 184, 200 (1964), [Warren C. J., dissenting]. Mindful of this admonition, California courts have consistently held Penal Code section 311(a)(2) does not create a new substantive offense. *People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967); *People v. Kuhns,* 61 Cal.App.3d 735, 132 Cal.Rptr. 725 (1976). Nor, as urged by petitioner, did this statute permit his conviction based on evidence of acts which were legitimate when committed. It was illegal to sell obscene matter in California long before the sale which occurred in this case. California Penal Code section 311.2 (added by Statutes 1961, chapter 2147); *People v. Aday,* 226 Cal.App.2d 520, 38 Cal.Rptr. 199 (1964), *cert. denied,* 379 U.S. 931. *Landau v. Fording,* 245 Cal.App.2d 820, 824, 54 Cal.Rptr. 177, 179-180 (1960), affirmed per curiam, 387 U.S. 456 (1967) (disapproved in *People v. Noroff,* 67 Cal.2d 791, 793, 63 Cal.Rptr. 575, 576 (1967), insofar as it suggested that California recognized a crime of "pandering" non-obscene material). Respondents respectfully submit therefore that California Penal Code section 311(a)(2) properly states a law of evidence well within recognized constitutional guidelines.

B. The Challenged Instructions were Properly Given in Petitioner's Case.

1. The Instructions are not Constitutionally Overbroad.

Petitioner, somewhat inconsistently, acknowledges this Court's recognition in *Ginzberg v. United States, supra,* of the probative value which evidence of the circumstances of production and dissemination can have in determining social value while seizing on one phrase from that opinion[3] to argue that the application of this rule must be limited to "close cases", a term he does not otherwise define, to avoid the vice of unconstitutional overbreadth. Respondent submits petitioner has misconstrued this court's meaning. Based solely on its content, absent evidence of production and dissemination, little material can be said to be obscene as a matter of law. Hence, in the context of an obscenity prosecution where the admissibility of evidence of production and dissemination is relevant to the issue of the material's obscenity, "close case" can only refer to the majority of cases where the material may, in some context, have redeeming social value. The closer the issue the greater the danger to First Amendment guarantees. Since this evidence could properly be admitted in a close case, it was properly admitted here. *Compare, Hamling v. United States,* 418 U.S. 87, 130 (1974).

Ginzberg simply did not limit the probative value of this evidence to cases where the social value

[3]The phrase "close case" appears in the following context, "We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test." 383 U.S. at 474.

of the material in question is close or ambiguous. *Milky Way Productions, Inc. v. Leary,* 305 F.Supp. 288 (S.D.N.Y. 1969) (three judge court), affirmed 397 U.S. 98 (1970); *accord United States v. Palladino,* 475 F.2d 65, 70-71 (1st Cir. 1973). Moreover, petitioner's argument that to be constitutional the admissibility of this evidence must be limited to close cases is wholly without merit on the instant record. It overlooks that the jury was instructed it had to find all three factors, beyond a reasonable doubt, before it could determine that this material was obscene. More importantly, it ignores California's non-statutory procedure, which precludes the prosecution from proceeding if the matter is non-obscene as a matter of law. This procedure avoids the greatest threat to First Amendment guarantees, conviction on the basis of non-obscene material, and developed from the case of *People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967). There the trial court dismissed a prosecution for selling allegedly obscene matter after viewing the material and determining that it was constitutionally protected. The prosecution appealed, arguing that even though the material was not obscene the jury could still convict based on evidence of defendant's commercial exploitation as in *Ginzberg v. United States, supra.* The California Supreme Court affirmed the trial court's dismissal on the grounds that unlike Title 18 U.S.C. section 1461, the offense of which defendant Noroff was charged, California Penal Code section 311.2 did not encompass the offense of advertising obscene matter. Thus, evidence of circumstances of production and dissemination can never be

used in California to convict a defendant for selling constitutionally protected material, regardless of the manner in which he had pandered it. A "Noroff" motion was made by petitioner prior to trial in the instant case and was denied (CT 62). Clearly therefore, there was, at the very minimum a "close case" presented to the jury in the instant case. We do not, of course, concede that this was a close case. On the contrary, the obscenity of these films is patent. The jury was given the definition of obscenity mandated by California law, a definition which affords greater protection than constitutionally required. *Hicks v. Miranda,* 419 U.S. 1018 (1975); *Bloom v. Municipal Court,* 16 Cal.3d 71, 127 Cal.Rptr. 317 (1976). Having been so instructed the jury could properly consider evidence of the circumstances of production and dissemination of this material to determine its social value on their way to finding petitioner guilty of selling obscene matter. *Hamling v. United States, supra; compare Kaplan v. California,* 413 U.S. 115, 122 fn. 5 (1973).

2. There was Sufficient Evidence to Justify Giving the Challenged Instructions.

Petitioner argues that there was insufficient evidence of "commercial exploitation" adduced at trial to justify giving instructions based on California Penal Code section 311(a)(2), and that, as applied to him, the "pandering doctrine" has been overbroadly construed. These arguments, we submit, reveal a misperception of the purpose of the statute and instructions.

At trial the jury was instructed, in part, as follows:

> "In determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal." (Appendix, p. 38).

Clearly, therefore, the question of commercial exploitation was for the jury to determine, based on facts adduced at trial. Petitioner correctly observes that the buyer made at least six attempts to obtain the films before the sale was successfully consummated. He fails to point out, however, that during the entire course of these prolonged negotiations, the buyer was consistently told by petitioner and his agents that the films were "hardcore". Indeed, the buyer was advised that the films were "under the counter", and was told that persons in the films would be "sucking toes, licking navels and everything else." Significantly, petitioner told the buyer that he had to be careful handling such "hardcore" material, as doing so had caused him to be "in a jam" with the police before. All of this evidence, we submit constitutes evidence of the circumstances of sale and thus justifies the giving of the challenged instructions.[4]

[4]Although respondent views the evidence as sufficient on the circumstances of sale and dissemination, it should be observed that if there were no such evidence petitioner's complaint would be unjustified. In that instance, there would be no danger at all that the jury could have based its finding of obscenity on anything other than the matter itself.

Neither is there merit to petitioner's complaint that the doctrine has been overbroadly construed as applied to him. The flaw in petitioner's argument is demonstrated by his assertion that the "pandering doctrine is designed to permit control of excessive, exploitive behavior, not to penalize normal commercial activity." This statement misperceives the purposes of California Penal Code section 311(a)(2) and the instructions given in the instant case. It is not the control of such conduct which is contemplated. Rather, it is the concept articulated by this Court in *Ginzberg v. United States,* 383 U.S. 463, that such evidence is *relevant* on the issue of redeeming social importance claimed for such matter. Thus, the doctrine does not provide the jury an alternative avenue to a conviction for the sale of obscene matter. Instead, its purpose is to allow the jury to consider relevant evidence on the issue of pruriency and redeeming social importance, which are elements essential to a finding of obscenity. When, as here, there is evidence of the circumstances of production, the film itself, its sale and distribution, such instructions are properly given.

3. Petitioner has not been Subjected to an Ex Post Facto Application of a Penal Statute.

The basic premise of petitioner's argument is that he has been convicted of "pandering" on evidence of conduct he believed non-culpable following the decision in *People v. Noroff,* 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967). Respondent disagrees.

Petitioner was convicted for selling obscene matter in violation of California Penal Code section 311.2

(Appendix, p. 26). California Penal Code section 311(a)(2) merely recognizes the probative value of evidence of production and dissemination on one of the three definitional requirements for a finding of obscenity. The constitutionality of considering such evidence as probative on the question of social value has been recognized since at least 1966. *Ginzberg v. United States,* 383 U.S. 463 (1966); but see *United States v. Rebhuhn,* 109 F.2d 512 (2nd Cir. 1940). California courts have similarly recognized the probative value of this evidence. *People v. Kuhns,* 61 Cal. App.3d 735, 132 Cal.Rptr. 725 (1976); *People v. Burnstad,* 32 Cal.App.3d 560, 108 Cal.Rptr. 247, overruled on other grounds in *People v. Superior Court (Freeman),* 14 Cal.3d 82, 87, 120 Cal.Rptr. 697, 701 (1975); *People v. Stout,* 18 Cal.App. 3d 172, 95 Cal.Rptr. 593 (1971); *Landau v. Fording,* 245 Cal.App.2d 820, 824, 54 Cal.Rptr. 177, 179-180 (1966), affirmed per curiam, 387 U.S. 456 (1967) disapproved on other grounds, *People v. Noroff,* 67 Cal.2d 761, 793, 63 Cal.Rptr. 575, 576 (1967).[5] The enactment of California Penal Code section 311(a)(2) did not aggravate the punishment for selling obscene matter, nor lower the standard of

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[5]Contrary to petitioner's assertion California Penal Code section 311(a)(2) was not adopted in response to *People v. Noroff, supra* (Brief for Petitioner, p. 13). That case merely held that California Penal Code section 311.2 did not encompass the crime of "pandering" non-obscene matter. The proposed legislation referred to in *People v. Noroff,* 67 Cal. 2d at 793, fn. 3, 63 Cal. Rptr. at 576, that would have created such an offense was not adopted. California Penal Code section 311(a)(2) recognizes the probative value of the circumstances of production and dissemination on the issue of social value and was adopted, if in response to anything, to this court's decision in *Ginzberg. Compare Ginzberg v. United States,* 383 U.S. at 470 with California Penal Code section 311(a)(2); *People v. Kuhns,* 61 Cal.App.3d at 749, 132 Cal.Rptr. at 732 (1976).

proof required for conviction. Neither did its adoption create the crime of "pandering". Advertising or promoting the sale or distribution of obscene matter is proscribed by California Penal Code section 311.5. Distinguishably California Penal Code section 311 (a)(2) is similar to a statute making a witness competent to testify [*Hopt v. Utah,* 110 U.S. 574, 587-590 (1884); *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5, 74 Cal.Rptr. 726, 731 (1969)] or authorizing the use of handwriting exemplars [*Thompson v. Mississippi,* 171 U.S. 380, 386-388 (1898); *People v. Snipe,* 25 Cal.App.3d 742, 747-748, 102 Cal.Rptr. 6, 9 (1972)]. The application of such statutes to pending suits is not an unconstitutional *ex post facto* alteration of the legal rules of evidence. *Luria v. United States,* 231 U.S. 9, 27 (1913); *Thompson v. Mississippi, supra; Hopt v. Utah, supra; Ward v. California,* 269 Fed.2d 906, 907 (9th Cir. 1959).

At least since the date of *Ginzberg,* evidence of production and dissemination of the material in question has been constitutionally admissible in obscenity prosecutions *even in the absence of a specific statute. Hamling v. United States,* 418 U.S. 87, 130 (1974). Hence, petitioner's claim that he was subjected to a retroactive application of California Penal Code section 311(a)(2) is meritless. *Compare Kaplan v. California,* 413 U.S. at 122, fn. 5. But even if the admission of this evidence required enactment of California Penal Code section 311(a)(2), the correct date for its application was the date of petitioner's trial. *People v. Bradford,* 70 Cal.2d 333, 343-344, fn. 5, 74 Cal.Rptr. 726, 731 (1969). Since the admission of such evidence

supported Ralph Ginzberg's conviction in 1966, petitioner cannot assert an unconstitutional application to his conduct in 1969.

To extend petitioner's argument by analogy, a defendant could claim that a statute recognizing the probative value of fingerprint evidence was wrongfully applied in his case, urging that had he known of the admissibility of such evidence he would have worn gloves at the time he committed the crime. Such a specious argument founders on the shoals of California Evidence Code section 351 which provides, "Except as otherwise provided by statute, all relevant evidence is admissible." (Statutes 1965, chapter 299, §351).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the California Court of Appeal be affirmed.

Dated, February 10, 1977.

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